UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re REFCO INC.
SECURITIES LITIGATION 07 MD 1902 (JSR)

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KENNETH M. KRYS, et al.,

Plaintiffs,

v. 07 CV 3594 (JSR)

DEUTSCHE BANK SECURITIES INC., et al.,

Defendants.

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KENNETH M. KRYS, et al.,

Plaintiffs,

v. 11 CV 1486 (JSR)

SCHULTE ROTH & ZABEL LLP,

Defendant.

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New York, N.Y.
March 14, 2012
2:55 p.m.

Before:

HON. RONALD HEDGES

Special Master

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(In open court)

THE COURT: Good afternoon, counsel. We're here for oral argument on various matters in the Refco litigation. For the record, I had an opportunity to speak before with regard to an informal application to quash a notice of deposition on James Palermo. I had an opportunity to discuss that with counsel. It's been agreed that Mr. Castranova and Mizsak will be deposed in the first instance. Or is it Mr. Aaron who is going to be deposed?

MR. BLACKHURST: It was a day or two, I believe.

THE COURT: Which ones?

MS. GUMMER: I think it makes sense to have all the others first.

THE COURT: That's fine. Have all the other depositions of the former DPM employees or the like taken first, and then we'll come back to Mr. Palermo's deposition.

And I understand, counsel. When you work out dates for at least some of these depositions, let me know. And I'm not telling you what to do or not to do, but I'm not quite convinced that the party who is noticing the deposition has an obligation to show me affirmatively that the people being deposed know more or know something unique other than Mr. Palermo. So if there is going to be an application for a protective order, I'll let you decide what you want to put in it, Ms. Gummer.

MS. GUMMER: OK.

THE COURT: Counsel, you're going to work out a stipulation and file it with the Court. I don't need to sign it. All right?

MS. GUMMER: Thank you, Judge. Yes.

THE COURT: All right. Let's talk about the deposition of Mr. Karlan and what's going to be seen or not seen in that. So can I have your appearances, please.

MR. BALBER: Sure, your Honor. Scott Balber from Chadbourne & Parke on behalf of Schulte Roth & Zabel.

MR. KARLAN: Good afternoon, your Honor. Mitch Karlan from Gibson Dunn & Crutcher. With me here is my colleague Diana Feinstein. We are counsel for defendants Kavanaugh and Owens. And also in the courtroom is counsel for Gibson Dunn & Crutcher, Peter Jerdee.

THE COURT: I'm sorry, your last name?

MR. JERDEE: Jerdee, your Honor.

THE COURT: Jerdee?

MR. JERDEE: J-e-r-d-e-e.

THE COURT: I suggest to counsel that before we begin, it might be appropriate to defer any ruling with regard to the scope of Mr. Karlan's testimony until we're into the deposition and see what happens. But I understand, from what your comment was, you think you need some things before.

MR. BALBER: Well, the focal point of our application, your Honor, was documents, which have already been produced by Owens and Kavanaugh to the plaintiffs and are the subject of a December 2010 protective order issued by your Honor. So we're here about the documents. And Mr. Karlan's deposition, while relevant to the issue, is only secondary, because the documents are going to dictate what we need to do or don't need to do.

THE COURT: Well, Mr. Karlan does raise an argument that this is an old order. There have been several intervening conferences. You have been put on notice at least since you were representing a party in this case that if discovery matters are not brought to my attention at a conference they were deemed waived. And we're certainly beyond that point. So why should I even entertain this application?

MR. BALBER: Well, your Honor, the order was entered in December 2010. Schulte was sued in March 2011. It appeared shortly thereafter. And the protective order on its face

doesn't speak to what the documents were, what they relate to, what the subject matter might be. The issue only became ripe for us to raise once we served a request on plaintiffs. Plaintiffs refused to turn over the documents, pointing to the protective order. What Gibson is suggesting is that once we got named in the case and appeared, we had an obligation to review all existing orders and come to your Honor and say, Judge, we don't like this one and this one and this one, can you please reconsider them. And while I don't want to purport to read your mind, I think you would have said, Mr. Balber, why don't you come back to me when you have a dispute that's ripe for adjudication. Here, the dispute became ripe for adjudication only six weeks ago or so, when we sought the documents and were told they were covered by this protective order.

Even looking at Gibson Dunn's privilege log, rendered on behalf of Kavanaugh and Owens, it's not on its face clear which of those 500 pages of documents relate to the 500 or so underlying documents that are at issue under this protective order.

THE COURT: Well, let me ask you a question.

MR. BALBER: Sure.

THE COURT: How many of the documents that were shared are you interested in looking at? All of them?

MR. BALBER: Ah, the answer is, I don't know. We

served a request seeking what I believe to be a narrow category of documents, your Honor. Let me explain what it is. One of the primary allegations against Schulte by plaintiffs in this case is that we committed malpractice by not providing sufficient or any advice on bankruptcy preference issues in connection with the PlusFunds decision to honor or not honor redemptions. Now, part of our defense among others is that at the same time, they purport to have been seeking and waiting for advice from us. They were getting advice, actually getting advice, by the law firms, including Gibson Dunn. This all happened in the second half of October 2005, and then whatever additional documents may have been created the next couple of months.

So all we're asking for, Judge, are the documents relating to advice being rendered on these bankruptcy preference redemption issues in basically a two- or three-month time frame.

THE COURT: By other law firms.

MR. BALBER: In this case by Gibson Dunn. We know Walkers was rendering the same advice. Seward & Kissel was rendering the same advice. We believe Sidley Austin was rendering the same advice. But Gibson was at the forefront of it and Gibson has been identified by witnesses as PlusFunds' bankruptcy counsel.

THE COURT: All right. Serve a document request, a

specific request for documents during this period solely relating to any type of legal advice being communicated. Or have you done that already?

MR. BALBER: We have. We have served that on plaintiffs. And what plaintiffs have done, your Honor --

THE COURT: No, I don't want you to serve it on plaintiffs. I want you to serve it on Gibson Dunn.

MR. BALBER: I'm happy to, your Honor, except the documents have already been produced. They are in the possession of plaintiffs. So my point is -- and I'll do whatever you want you to, of course, your Honor -- they are in the possession of plaintiffs. Plaintiffs have an obligation to produce them to us. They are willing to produce them to us. The only impediment is that Gibson is asserting on behalf of Owens and Kavanaugh protections of this protective order.

THE COURT: I understand the argument.

I don't see any reason why counsel can't see it. I appreciate the argument with regard to the protective order. I'm not satisfied, though, that there has been any waiver of rights to make an application for an information that really arose within a short period of time. I'll extend the order to allow information to be made available to you. Counsel sign off on anything else you need to sign off on. You're entitled to get the information three days before the deposition commences.

When is the dep going to be taken?

MR. KARLAN: Your Honor, we're going to have to ask for a stay. The issue here is the privilege of Mr. Kavanaugh and Mr. Owens, and we're going to have to appeal this, your Honor. I'm sorry.

THE COURT: What privilege?

MR. KARLAN: Their attorney-client privilege, your Honor, which you recognized and which Judge Rakoff recognized in the same December 10th order. The reason your Honor entered the December 10th order, Judge, that there are documents -- the documents in question, 627 documents, were written at a time when Kavanaugh, Owens, Sugrue, and PlusFunds were co-clients of Gibson Dunn & Crutcher. Each of them has a right to have their privileges protected. The documents had to be produced by us to the plaintiffs, as you recognized in your December 2010 order, because they are the successor in interest to one of our former clients. But as your Honor also recognized in the order, no one else has any right to see those unless and until all of the other clients waive their privileges, none of which has happened. So, respectfully, Judge, there's absolutely no basis in law for your Honor to enter such an order even --

THE COURT: No, there's no basis in law for me to do it, but if they've got a defense and they want to see some of the things, how are they going to be able to --

MR. KARLAN: If I can just, Judge -- this is dicta for

me at this point, right?

THE COURT: Yes. How are they going to be able to prove their case?

MR. KARLAN: It's not my concern, Judge.

THE COURT: I know, but it's mine.

MR. KARLAN: Privilege is. Privileges exist to prevent and frustrate litigants from getting information. The question your Honor is asking, if answered in its fullest, means there are no more privileges. By definition, valid privileges prevent litigants from having access to information that would otherwise be fun and interesting to have.

THE COURT: Unless under Rule 502(d) I enter a quick peep order and you produce it without there being a waiver of any privilege. Isn't that right?

MR. KARLAN: No, Judge.

THE COURT: No?

MR. KARLAN: Respectfully, it is not right. Respectfully, Judge, there is law in the Second Circuit about when, if ever, a protective order that has been relied upon by litigants, who have produced documents on the assumption that the order was valid and would protect them in the future, may be vacated.

THE COURT: I understand that. I'm suggesting --

MR. KARLAN: No one cited that law --

THE COURT: Hold on.

MR. KARLAN: -- including your Honor.

THE COURT: Mr. Kaplan --

MR. KARLAN: Karlan.

THE COURT: Karlan, I'm sorry. -- let me get a word in, if you don't mind.

MR. KARLAN: I just wanted, your Honor, the opportunity to be heard before you finished ruling.

THE COURT: I have not finished ruling on anything.

MR. KARLAN: It sounded like you had.

THE COURT: I raised something waiting for you to go off the wall, Mr. Karlan. Am I right? Right?

MR. KARLAN: No.

THE COURT: No, I'm right that you went off the wall. Nicely. Nicely.

How do I deal with the privilege problem?

MR. BALBER: This is really easy, Judge. This is really easy. OK. Mr. Karlan's argument is based on a fundamentally false premise. And let me explain what it is.

THE COURT: That's consistent with the ruling I made back in 2010.

MR. BALBER: Completely consistent, Judge.

THE COURT: OK.

MR. BALBER: Let me explain why. There is -- let me start this way. There are theoretically two buckets of documents as to which Mr. Karlan's clients have asserted a

privilege.

Bucket one are documents as to which there is this, quote, joint privilege between PlusFunds and Kavanaugh and Owens. There is no such privilege. The law is really clear. There can be no joint privilege between a corporation and corporate officers. Period. No privilege.

Bucket two, Judge. Bucket two is, to the extent there are communications between Owens and Kavanaugh on the one hand and their counsel on the other hand, which is personal, private, separate advice, OK, now, I don't think Mr. Karlan has met that test. But the point is, that privilege exists.

Now, here's the key. To the extent documents have been produced to plaintiffs, they must fit within the first category, because if they didn't fit within the first category, the privilege would have been waived. And as to the first category, there is no viable privilege.

So if what Mr. Karlan is seeking to protect are communications between his law firm and Owens and Kavanaugh about personal representation issues, under the *Bevill Bresler* test, he can meet that standard or not.

THE COURT: *Bevill Bresler* is the Third Circuit.

MR. BALBER: It is. Your Honor should know it well.

THE COURT: I do know it well.

MR. BALBER: Right. So as to that category, he can either fit within the test or not. But whatever he has

produced to the plaintiffs, whatever is covered by the protective order is not covered by a viable privilege. It doesn't exist. The case law is consistent and clear and there's not a single case going the other way. And we cite all the cases in our brief, your Honor, and I will direct you to the *MacKenzie-Childs* case, the *In re Grand Jury Subpoena* case, etc.

THE COURT: What do the plaintiffs say about this?

MR. BLACKHURST: Actually, I have two points to make. One is to the extent -- I think the dispute here is over the advice that Gibson Dunn gave to the funds regarding receptions. I do not understand how Kavanaugh and Owens, as directors of the funds, have any interest, have any personal interest, in advice to the funds about whether to honor redemption. It's a PlusFunds privilege. It's a Sphinx interest. That's point one.

Point two is, with respect to the December order, as I recall -- and I haven't looked at it in preparation for this -- I believe we had that order entered as a precaution. I think there's language there that says we don't think that there's a joint interest privilege and it was a catchall. I don't think there's a substantive rule. That's all I was going to say. We have no problem producing Mr. Dauber.

THE COURT: Mr. Karlan, what about the distinction that counsel makes between personal communications of your

individuals, with you, as opposed to communications involving the corporation?

MR. KARLAN: Judge, there's an evidentiary record here on this motion, in the form of Mr. Kurstein's affidavit, which has a number of exhibits. The facts are these, Judge. Gibson Dunn & Crutcher was counsel to Kavanaugh, Sugrue, Owens, and several others before it was counsel to PlusFunds. It represented them in their capacity as owners of PlusFunds. The cases that are cited to you in the Schulte letter, reference to which was just made by Mr. Balber, deal with a completely different factual circumstance. The cases that deal with the circumstance that's relevant here are cited to you in our letter of February 15th, 2012. And it's clear there is a privilege here and that it cannot be overcome simply because one of the co-clients has waived.

THE COURT: What if I decide on another matter today that employees or officers of a corporation have no expectation of privacy in any communications made in a business system or information left in a business system? What then?

MR. KARLAN: Of the 627 documents that are at issue on this application, I can't say that each and every one of them falls outside that issue, but the vast majority of them does.

The facts are these, Judge: Mr. Owens and Mr. Kavanaugh did not have PlusFunds' domain e-mail addresses, and none of Gibson Dunn's communications to them via e-mail

were to a PlusFunds server. Mr. Sugrue did use his PlusFunds domain e-mail, and I don't know how many of these e-mails went to him or from him at that address. I can tell you that not all of them did.

THE COURT: I appreciate the argument, gentlemen. I decline to rule on this. You'll begin Mr. Karlan's deposition. Three days before the deposition, you -- well, with the deposition, you bring with you the documents. I want a set of the documents delivered to me three days before the deposition. And when we get into the deposition, I'll decide what I want to do. I'm not inclined to do it now. And you can get me a stipulation that says that.

So pick a date for your deposition, Mr. Karlan. When is it going to be?

MR. KARLAN: Whenever anyone wishes.

THE COURT: Next week.

MR. KARLAN: I'm available.

MR. BALBER: Just mechanics, your Honor, for purpose of the order. The documents will be given to you three days before. And then what about the documents vis-a-vis the deposition?

THE COURT: Bring a set with you in case I decide that they can be turned over. I'll have you give it to Mr. Karlan.

And Mr. Karlan then can make an application to stay the deposition so he can go to Judge Rakoff.

MR. BALBER: You mean him bring a set to give them to me.

THE COURT: Yes. I'm sorry. I had it the wrong way. Yes. Have him bring a set to bring to you. If I decide they're going to be turned over, Mr. Karlan can make an application, which I may or may not grant. And we'll go from there.

MR. BALBER: OK. Thank you, Judge.

THE COURT: So agree on a date for the deposition. Tell me when it is.

MR. KARLAN: Whenever anyone wishes.

THE COURT: OK. A week from today. No, today, that's that -- 21st?

MR. BLACKHURST: I need to check with Mr. Beus, who couldn't be here today. He's planning on taking this deposition. We're happy to work out dates.

THE COURT: OK. Let's get the dates worked out, but have it done before the end of the month.

And where is it going to be? At your office?

MR. KARLAN: Wherever everyone wishes it to be.

MR. BALBER: One mechanical issue with that, Judge. I'm just anticipating this so we don't have to bother you right out of the box. Plaintiffs have the documents, Judge. I assume, although I don't know for sure, that plaintiffs will use the documents with Mr. Karlan, like from the get-go.

THE COURT: Why don't we wait and see what happens.

MR. BALBER: Sure, Judge.

THE COURT: I assume Mr. Beus is going to be leading the direct.

MR. BLACKHURST: Correct.

THE COURT: Let's wait and see what happens. I'm not inclined to get into this until I have to.

MR. BALBER: OK. Judge, thank you.

THE COURT: All right. Work out a date. Get me a stipulation. The stipulation should have the date. It's going to be one day, I assume, no more than seven hours.

MR. KARLAN: I think folks are going to be disappointed with my deposition, Judge. I'd be surprised if it went a half day.

THE COURT: Oh, Mr. Karlan, I'll be so amazed. I may come over and listen just because it's going to be so much fun.

MR. KARLAN: It's going to be the Sergeant Schultz of depositions.

THE COURT: All right. Let's get a stipulation. The stipulation is going to provide, number one, you're going to put in one date for deposition. Presumptively it's going to be seven hours, as the rules require, or state. Also, the plaintiffs will bring a set of the documents with them to the deposition. Have delivered to me three business days before a set of the -- how many documents are we talking about?

MR. KARLAN: 627, Judge.

THE COURT: I don't want 627. I thought you told me there were 40-something before. Didn't you say that?

MR. KARLAN: I did not, Judge.

MR. BLACKHURST: He said, yes, he said 600.

THE COURT: All right. I must have been thinking I had another number there. OK. 627, binders, all the documents in them.

MR. BALBER: Do you want another three days, Judge?

THE COURT: No, just fine. I'm not going to look at them until it comes up at a dep. And we'll see what Mr. Karlan has to say. Mr. Karlan has no personal recollection.

I think I'll come for the deposition. Let's figure out where it's going to be. Tell me where it's going to be and I'll show up. But I still want the documents before. And you can have another set -- that set that you may turn over, leave it there at the deposition. I'll be able to use that. I'm not going to truck 600-odd documents in and out. OK? So work that out. Get a stip file. I don't need to see the stip. Talk to me before or just confirm with me when I'm available for the deposition. All right?

MR. BALBER: Thank you, Judge.

THE COURT: OK. We had some correspondence before about the funding issue for Ms. Farquharson's deposition. Let's do that. Do we have people here for that? Is

Ms. Farquharson's counsel here?

MR. KARLAN: Your Honor, in fairness to those who are not here, I think what your Honor did was schedule the omnibus conference for 4 o'clock.

THE COURT: Yes, and this for 3.

MR. KARLAN: And this for 3. But I think the only people who were supposed to be here for 3 were the Karlan folks and one other. Everybody else was coming at 4.

THE COURT: All right. This will take a minute to get rid of. It's not going to be --

Actually, who's here representing one side of the Farquharson issue?

MR. KARLAN: I am.

THE COURT: Well, when their attorney comes in, I think you should have a discussion with them and ask them to suggest to me where in the Federal Rules of Civil Procedure I get to shift costs, unless it's under Rule 45, because the deposition will be impressive and there's no record I see telling me $30,000 is impressive.

Now, with that, I don't want any comment on it. You have a discussion with them. Maybe we can shift the costs after. Maybe you'll share the costs. That's another possibility. But we'll do it at 4.

MR. KARLAN: I had an application to have the plaintiffs share it, pursuant to a --

THE COURT: Then why are you taking a position on this?

MR. KARLAN: I'm the one who asked for the documents, then.

THE COURT: That's not the issue, then. You go talk to Ms. Farquharson's attorney about sharing costs, when her attorney shows up.

MR. BLACKHURST: I'm happy to talk to her.

THE COURT: I take it you'll know what the answer is going to be very quickly. All right. We'll do that at 4 o'clock.

OK. Let's do this Krys v. Aaron dispute with regard to Aprendi and Aaronson.

Who's missing?

MR. DUNN: Matthew Dunn for Mr. Aprendi and Mr. Aaronson from Carter Ledyard.

THE COURT: I guess they didn't know they were supposed to be here at 3 o'clock.

MS. GUMMER: They did. Your Honor told them.

MR. DUNN: Counsel for -- I'm counsel for Aprendi and Aaronson.

THE COURT: Good. Come on up and let's argue it. I thought you said some other people were going to be here. I'm sorry. I thought you just said you were waiting for some other

people. No?

MR. DUNN: No, your Honor.

THE COURT: Good. Your appearances, please.

MS. GUMMER: Katie Gummer on behalf of the Lee defendants.

MR. DUNN: Matthew Dunn from Carter Ledyard & Milburn for non-parties Christopher Aprendi and Paul Aaronson.

THE COURT: So I understand the issue is that when your clients left the employment of the funds, they took some things with them. Is that right?

MR. DUNN: That's right, your Honor.

THE COURT: And they asserted privilege as to a number of the things that they took with him.

MR. DUNN: Very few, but correspondence with their own individual counsel, yes, your Honor.

THE COURT: And all this e-mail went through a corporate system?

MR. DUNN: Most of it, your Honor.

THE COURT: Well, the e-mail that didn't go through a corporate system is a different question.

MR. DUNN: Correct.

THE COURT: And that's not an issue, is it?

MS. GUMMER: No, your Honor.

THE COURT: OK. Do you know what other systems these communications went through? And have you gotten all the

documents?

MS. GUMMER: Your Honor, we don't.

MR. DUNN: I mean, I can clarify, your Honor. If you look at the privilege log, there are a few e-mails from 2007. These people left at the end of December '05, so those are obviously from a personal e-mail account.

THE COURT: All right. So we're only talking about documents before the date of their termination or separation.

MR. DUNN: Right. And all the e-mails, your Honor, are from either -- I think they're all December '05. But in any event, if there may be some in November '05, it was all in the context of the SEC investigation and their separation from PlusFunds.

THE COURT: Well, you agree a waiver is a waiver, right? You can't selectively waive for one thing and then keep it for another, correct? That's not an issue, though.

MR. DUNN: Correct. The issue is that, you know, our client's position is that they didn't waive.

THE COURT: Well, let me ask you a question. We have an e-mail from general counsel or someone else in the corporation, I believe in March of 2005, saying, anything that goes through a corporate system you have no expectation of privacy in or the like, it belongs to the company. We have a written corporate policy, I believe, from later that year, which, Ms. Gummer, led me to the question at first, this is the

written corporate policy sometime in 2005. What was the policy before? And the e-mail that I saw in March seems to demonstrate that there was a corporate policy that preexisted the written one. Is that right?

MS. GUMMER: I think that's right, your Honor.

MR. DUNN: We don't dispute the existence of the policy, your Honor. The question is whether the existence of such a policy results in a waiver of privilege automatically as a bright line rule. And it certainly does not. The cases are very fact-specific. Even the case that Ms. Gummer sent to you today says --

THE COURT: The one I didn't read?

MR. DUNN: It says right in it that it's a fact-specific inquiry --

THE COURT: I agree with you.

MR. DUNN: -- that it depends on the circumstances. And there are cases, including the case I cited when she e-mailed you last week, *Curto*, in which, you know, perhaps not exactly on point, but in the face of such a policy, e-mails sent over the company system were held not to result in a waiver and the privilege was respected.

THE COURT: Why was that? Why wasn't it a waiver?

MR. DUNN: There are factors that are examined under the *Asia Global Crossing* case, one of which is whether the company actually enforces and monitors -- your Honor, I'm just

telling you what the Court said.

THE COURT: No, I understand. But I have --

MR. DUNN: Whether you agree or disagree.

THE COURT: Excuse me. I have a problem with the concept that if a corporation says information is its property and it reserves the right to monitor, whether it monitors or not seems to be irrelevant. Don't you think? Or do you want Ms. Gummer to depose your clients exactly on what their understanding was on all these things? I think I have enough facts on this record to make it pretty clear that there was no privilege.

MR. DUNN: Your Honor, can I just add a few -- getting to these circumstances and the facts that need to be looked at in this situation, this is a situation where the company is in crisis mode, for one. There is an SEC investigation. There's a lot of lack of information at this point and the desire to obtain the big picture regarding the Refco collapse, the implications, the preference claim, etc.

In late October '05, after Refco collapsed, the PlusFunds' board signs off on a resolution fully indemnifying the officers and agreeing to pay their legal fees. Now, right there, from then on, there's an expectation that these individuals are retaining outside counsel, that they need individual counsel.

THE COURT: I don't disagree with you, counsel. The

question is how they communicate with those counsel. Why didn't they just start using some other communications means, instead of using the corporate system?

MR. DUNN: I mean, your Honor, I mean, I wasn't there, I don't know the answer to that. All I can say is time constraints. The pace at which things were happening was pretty extreme.

THE COURT: Well, I understand the pace at which things were happening was extreme. But the question is what's in their mind or what should be in their mind, and it seems to me, in June at the latest of 2005 and even earlier than that, there is a policy within the corporation that says if you use a corporate system, you have no expectation of privacy, which means you can't have a privilege. And I understand it's a very fact-intensive inquiry. But the only fact that seems to go your way possibly is your surmise that there was never any kind of monitoring. And I don't know that from the record, such as there is, do I?

MR. DUNN: Right. I mean, that's one fact and that's what we've been told.

THE COURT: You're assuming --

MR. DUNN: I don't have any evidence of monitoring, let's put it that way.

THE COURT: You're assuming I should apply the standards of the *Asia* case.

MR. DUNN: Well, I'm assuming, first of all, that -- our clients are non-parties, to begin with. And they have cooperated through this whole process. Mr. Aaronson produced his privilege log in November 2010. A year and a half later, this issue is raised.

THE COURT: Why isn't this waived, Ms. Gummer? You had an opportunity to bring this to my attention long before now, then.

MS. GUMMER: Your Honor, for him to say that they cooperated is a bit of an exaggerated, given the number of times people appeared before your Honor to obtain their cooperation.

THE COURT: I understand.

MS. GUMMER: And my recollection is they represented that there was no such corporate policy. We learned that there was a written corporate document and we saw the e-mail from the general counsel saying there was a written corporate policy and reminding all of the employees of the corporate policy, to which Mr. Aprendi responded, nicely worded, within the last month, based on a submission from defendant's counsel.

THE COURT: Do you both agree that ABA formal opinions are things that a court should look at, under New York law, to decide the existence of a privilege or a lawyer's duties?

MR. DUNN: Perhaps it's persuasive authority, not binding authority, your Honor.

THE COURT: Have you read opinions 11459 and 11460 that came out last August? Both of which suggest that attorneys should realize that if they communicate with their clients over corporate systems, there may be problems with confidentiality, and that a corporate attorney has no obligation to advise someone representing an individual that that attorney has seen e-mails going to that attorney over a corporate e-mail system, subject to other law, which is the New Jersey *Stengard* opinion. And that came out because there was an ambiguity in the policy. There's no ambiguity in this policy, is there?

MR. DUNN: Well, each policy is different, which is why it's a fact-intensive investigation.

THE COURT: I don't disagree with you.

MR. DUNN: For example --

THE COURT: Excuse me. I don't disagree with you. Every policy is different. I have the policy in front of me. The only thing you're pointing to is the possibility that monitoring is something I should take into account. There is one decision that suggests monitoring is a factor. There are other decisions around the country that suggest the opposite, that there is no waiver of your rights by not monitoring something when you've got a right to monitor it.

I'll tell you what. Take your depositions. You have an hour each for each of them. Inquire into what their

understandings were.

MR. DUNN: Your Honor --

THE COURT: Either that or I rule today, counsel. What do you want me to do?

MR. DUNN: Your Honor, all our clients are already having their depositions taken.

THE COURT: So what?

MR. DUNN: And they have agreed to two-day depositions, so...

THE COURT: That's got nothing to do with this. I'm giving you a chance to have them deposed, to build that record if you want to. Either that or bring them here, produce them, and they can be examined under oath here. What do want? Your choice, you know. Deposition or I rule.

MR. DUNN: Your Honor, as non-parties, it strikes us that Ms. Gummer should have to bring a motion to compel here.

THE COURT: Oh. You want her to do that?

MR. DUNN: Yes, your Honor.

MS. GUMMER: I thought we did that. I thought that's why we're here.

THE COURT: We did it because I said you didn't have to do it formally. But since counsel is complaining there's not a formal motion, let's do a motion. If I rule in your favor, I may consider the imposition of costs under 1927 against counsel --

MS. GUMMER: Thank you, your Honor.

THE COURT: -- for making that necessary. Counsel, you're free to do what you want. You know what the record is.

MR. DUNN: Your Honor --

THE COURT: Excuse me, excuse me. I've had enough. You want to make a record, I'm giving you an opportunity to make a record. You're telling me that they didn't know what the policy is or the policy is a multifactor. You can tell me the policy is ambiguous. But I read it. It's not. And now you're telling me and you've told me in your submission that maybe there has to be monitoring. I don't think I agree with you, but I'll give you a chance to make a fuller record.

MR. DUNN: Your Honor, and I'm not saying that they didn't, you know, know about the policy or they have had their head in the sand. That's not what I'm saying, your Honor.

THE COURT: Well then, tell me what you're saying.

MR. DUNN: I just feel like this matter, there should be a fuller record, even a fuller briefing.

THE COURT: Fine.

MR. DUNN: Perhaps a few pages from each party due by a certain date.

THE COURT: Counsel, I'm giving you an opportunity. Make Ms. Gummer make her motion. I've told you what the consequence of it may be.

OK. When do you want to file it?

MS. GUMMER: A week from --

THE COURT: A week from today?

MS. GUMMER: Yes, your Honor.

THE COURT: A week from today, file a motion. Two weeks from today, opposition comes in. I'll give you a date for argument, Ms. Gummer. Write up a stipulation that says that. Once I see all the papers, I'll give you a date to argue.

MR. DUNN: And if between now and Friday we determine that -- what's our alternative, your Honor?

THE COURT: Work something out with her. Or I'll just order them to be produced without a formal motion, counsel. There's no ambiguity in this policy. The only thing you have going for you in this argument, as far as I can see, is that there's no monitoring, the cases are split around the country as to whether there's a need for monitoring. There are decisions from the ABA that you tell me are persuasive if nothing else that undermine your argument, frankly, on the face of a nonambiguous policy. I don't see an ambiguity in the policy. There is one sentence in here that I could see, if you strain, might create an ambiguity. And I'll let you guys decide to write about that when you write a brief.

OK. That's what I want done. Thank you.

MS. GUMMER: Thank you, Judge.

THE COURT: All right. Anybody else ready for any

argument on anything?

I suggest you work this out.

We're off the record.

(Discussion held off the record)

THE COURT: Your appearance, first, please.

MR. NOONE: Robert Noone for attorney defendant Patrina Farquharson.

THE COURT: I understand you want some costs shared.

By the way, I will tell you, you would be in a lot stronger position if you were representing a non-party other than a party. So let's leave that aside. Because the language in Rule 45 doesn't appear in any other rules. Right?

MR. NOONE: For what it's worth, the notice was issued originally in a case that Ms. Farquharson was not a party to. But it was also issued in a case where she is a party. So I think that distinction is not going to get very far here.

THE COURT: No.

MR. NOONE: The issue here, Judge, is that Ms. Farquharson has produced her documents on a number of occasions. She produced them to the joint liquidators at the time that they took over. She has given documents to -- wound up in the possession of Mr. Ginsberg during the course of the events that led us here today. And all of those documents have been turned over to everyone. In addition, most recently, she produced all the hard-copy documents she had in her possession.

THE COURT: But this is about the cost of producing electronically stored information that's going to cost about $30,000 to do, correct?

MR. NOONE: Correct.

THE COURT: Has that information been produced before to anybody?

MR. NOONE: We are not able to, with certainty, say that there is no piece of electronic information that she hadn't previously printed out and produced. We cannot make that representation. But nor can the people seeking the information provide a basis to infer that something was not previously produced. We're both in the situation -- well, I haven't heard any suggestion as to why there's a suspicion --

THE COURT: Who has the burden of proof to make what is the equivalent of a protective order? You. So you have to be able to demonstrate -- and I understand the quandary. You have to be able to demonstrate that all the ESI that your client is going to be asked to get now has already been produced, I assume in electronic form, or is it in paper? And that's another question, because you can do more things with electronic information, assuming it's searchable, than you can with a piece of paper.

MR. NOONE: To be sure. And all paper production up to now. And the issue, from my perspective, the issue here is, we've got a former director who's being asked to lay out an

expense equivalent to 40 percent of her annual salary in a case involving hundreds of millions of dollars, in a case involving liquidators who only recently announced that they would not advance this cost to their former director, who they have also described as innocent. And we've got parties --

THE COURT: Who said that?

MR. NOONE: Mr. Beus.

THE COURT: Is that right, she's innocent?

MR. BLACKHURST: We believe she's innocent.

THE COURT: "We believe." Does anyone believe she's not?

There are the hands up. OK. Never mind.

Why don't you advance these cost?

MR. BLACKHURST: Our position is that we're not the requesting party. We believe she is producing it. It's not our obligation to pay for it. To the extent someone should bear the cost, it's the party that requested the production.

THE COURT: Can you tell me where in the Federal Rules of Civil Procedure I can do that?

MR. BLACKHURST: We're in a better position if she is a non-party, which is what you said a few minutes ago.

THE COURT: That's exactly right, because I don't have the language in Rule 26 that I have in another rule. And the only rule you could rely on, counsel, frankly, would be 26(d)(2)(C), which is the proportionality rule. And there's a

debate there whether that rule authorizes cost-shifting or whether it simply allows restrictions on discovery.

Where does she live?

MR. NOONE: In the Bahamas.

THE COURT: And what's the value of her property?

MR. NOONE: That I cannot tell you at this time.

THE COURT: Don't you think I need to know more than, this would cost her X percent of her salary? If she's sitting on properties worth several million dollars or whatever -- and I don't know whether she is or she didn't -- my sympathies go downhill faster.

Who noticed her deposition?

Ah, Mr. Karlan. Your name pops up everywhere here today.

MR. KARLAN: Bad penny, Judge.

THE COURT: You don't want to -- you did too?

MS. GUMMER: Well, we served the subpoena for -- we served another as well.

THE COURT: Well, I don't think that's relevant anymore because we have a party deposition being taken now. Correct? Mr. Karlan, I assume, doesn't want to share the cost, right, Mr. Karlan?

MR. KARLAN: That's correct.

THE COURT: Why not? Your clients live in some nice place, don't they? Where do they live?

MR. KARLAN: Dublin. Dublin, the new third world.

THE COURT: I don't know about Dublin being a third world. Maybe Greece. But I don't know if it's got that far yet. But in any event...

MR. KARLAN: Judge, just to fill out the fact record here, the plaintiffs --

THE COURT: That's the problem we're having with everything, Mr. Karlan. People are supposing things and they don't know it for a fact.

MR. KARLAN: No, just, you asked a question and I don't think you got a complete answer.

THE COURT: OK.

MR. KARLAN: You asked, I think, whether there was reason to believe that she has an electronic database to produce. I wanted to remind you that there was a message issued during her repeated Ginsberg conferences that Mr. Ginsberg had received from his former client, Ms. Farquharson, many of her e-mails, but that he had never received the attachments. And they have also not been produced by the plaintiffs.

THE COURT: Does your client have all the e-mail with attachments to it?

MR. NOONE: We don't know yet, your Honor, because we haven't incurred the expense of loading up the electronic data and starting the searching process.

THE COURT: You don't have an index?

MR. NOONE: No.

THE COURT: Your client can bear the expense, at least in the first instance, of loading this information so we can see what it is. If it turns out that all the attachments are stripped, I doubt I'll make you produce it. But we've got to at least know what's there. If Mr. Ginsberg is representing that the e-mails have no attachments, I don't know what the attachments are. I'm willing to entertain cost-shifting if I get an affidavit from you, or someone, telling me what it's going to cost to go through with all this, number one, and, number two, what your client's entire assets are.

So I'm willing to talk about cost-shifting or cost-sharing. I think Rule 26(b)(2)(C) authorizes it, although that other judge does not agree with me, but, you know, he's in Washington and I'm sitting here.

MR. KARLAN: Judge, when the affidavit on her assets comes in, one of her assets, perhaps her most valuable asset given her situation in this lawsuit, is the rights to indemnification she enjoys vis-a-vis the plaintiffs. That's the nature of Mr. Macinnis's application.

THE COURT: Where does that get me?

MR. KARLAN: To an order directing the plaintiffs to bear this cost, since they should have produced these documents six years ago when this case commenced, and ought to have

sanctions imposed upon them for not having done so.

THE COURT: OK. Sure. Say something.

MR. BLACKHURST: Can I respond to that?

THE COURT: Why not.

MR. BLACKHURST: We produced everything we've got.

THE COURT: Well, I suppose the question is, if you produced everything you have and Ms. Farquharson was a director, why didn't, six or seven years ago, you go to her and say, where is all the information that I have to have?

MR. BLACKHURST: We went through much of the same rigmarole that you did with Mr. Ginsberg as her counsel. We got everything we could get out of him. We got to the point where we don't think that we could get anything more out of him. And that was the end of the road. We produced everything we got.

THE COURT: Enough. Your client is to at least get this information into an index so we know what's on it.

MR. NOONE: In addition, you mentioned specifically the issue about e-mail attachments. Is there anything else we should focus specifically on?

THE COURT: Well, no, when it's indexed we should be able to know what the attachments are. But tell her to make sure she talks with a consultant, whatever is done, so we're able to know whether we've got just naked e-mail, hate to say it, or e-mail with attachments. And I don't want to hear about

this until you've had a discussion with Mr. Karlan, who I take it is going to be leading the deposition of her, to see if you can agree on what she's got and what you're going to produce. And I'm willing to discuss costs after. But certainly, Mr. Karlan, I appreciate the invitation for sanctions. I don't see a basis for that under Rule 37 or inherent authority or statute. So if you want to pursue that, if some of you want to pursue sanctions some day, be so kind as to cite the source you're relying on, which is either 28 U.S.C. 1927, probably, or Rule 37 of the federal rules, and then you have to show an order under 37(a) before you ask for sanctions under 37(b). And then you can also come back to the court's inherent power. OK?

Have a discussion with Mr. Karlan. I don't want to see her incur more costs than she needs to. You are the lead person on this, Mr. Karlan. So you have conversations with counsel about how we deal with this. OK?

MR. KARLAN: Yes, sir.

THE COURT: And if someone else wants something more, they can pay for it. I can do that now. OK? So people should make sure they talk to you if they're interested in something. I don't want to hear an agreement has been reached and someone jumps in and says, I want more. So keep people advised about what's going on. All right?

MR. KARLAN: Yes, sir.

THE COURT: All right. Now, before we had a reporter here, we were having a brief conversation about where we are in the case. I understand that there are three reports and recommendations that remain before Professor Capra. One of them was argued last June or May?

MR. BALBER: Last June, your Honor.

THE COURT: One was argued last June. There were two other motions returnable before him or argued before him on March 29. Correct?

MR. BLACKHURST: Correct.

THE COURT: We have one summary judgment motion that's been made on behalf of who?

MS. JOYCE: On behalf of Grant Thornton, your Honor, in the PAT action.

THE COURT: OK. On behalf of Grant Thornton in the one action, that's been referred to Professor Capra, and I assume until the opposition paper comes in, nothing is going to him, correct?

MS. JOYCE: Correct, your Honor. The briefing is on April 30, 2012.

THE COURT: Who's your adversary on that?

MS. JOYCE: Private Actions.

THE COURT: I know. Come on. You don't have to hide in back.

MR. CALAMARI: I'm Nick Calamari on behalf of the

Retro Five action.

THE COURT: Have a seat Mr. Calamari. Your briefs are due when?

MR. CALAMARI: April 13, your Honor.

THE COURT: And the reply?

MS. JOYCE: April 30.

THE COURT: So by April 30, that's going to be going to Professor Capra. Mr. Anker, would you put that in what you're going to be getting for me?

MR. ANKER: Yes, sir.

THE COURT: All I need to say is there are three R&Rs that remain before Professor Capra. Two of them remain to be argued. One is going to be argued. We have a motion by Grant Thornton. Then the motions are supposed to be closed by April 30th. Correct?

MS. JOYCE: Yes.

THE COURT: I also asked off the record whether anyone was contemplating motion practice. As Mr. Anker said, there is a procedure for that to be done. If a motion is being made before all discovery is done and before expert reports are coming in, so if any of you want to make a motion before discovery is completed, you have to write Professor Capra and have whatever discussions you're going to have about that. OK?

There are a number of depositions that remain to be taken. We know yours, Mr. Karlan. We know we're going to be

taking your clients. We know Ms. Farquharson is going to be deposed. Correct?

OK. Who else has to be deposed in this to get fact discovery done? And I know you've got a period of time to do testimony. I just want to get a handle on how many are being done.

MR. ANKER: Your Honor, Philip Anker. The sides have taken, I don't know, on the order of 25 depositions already. I think we actually have this in a letter. The defendants have noticed 32 fact depositions. 15 of them have been taken. Plaintiff has noticed 23 and seven have been taken. There's a large number scheduled to be taken in the remainder of this month and into April. A number of the witnesses simply were not available.

THE COURT: My recollection is it was going to be done by the end of April or so. Is that right or wrong?

MR. ANKER: That is not right, your Honor. Fact discovery closes in this case on July 31. And we will be noticing additional depositions.

But I think it fair to say -- and I think this is probably an issue on which the plaintiffs and defendants are in agreement -- the parties are making substantial progress and I think we're working quite hard and working well with the third parties to arrangement the depositions.

THE COURT: Any problems with regard to location of

depositions or the like, and protective orders?

MR. ANKER: Your Honor, there is one issue, I think, that I don't want to touch on that deals with Mr. Karlan's witnesses. But I did want to focus you on one thing in your letter, and just an FYI.

THE COURT: Hold on one second. Are we going to go to Ireland for your deposition?

MR. KARLAN: You don't have to come. You're invited.

THE COURT: OK. I think between all of us going there and two people coming here, I think we have got to let them come here.

MR. KARLAN: Judge do you want to do anything about that or shall I wait?

THE COURT: I don't think there's much to speak about.

MR. KARLAN: Will I have an opportunity to be heard, Judge?

THE COURT: Yes, right now. Go ahead. Tell me. Why should I make all these lawyers troop to England or Ireland, when two bodies can come here?

MR. KARLAN: May we go off the record, Judge.

THE COURT: Yes. Go ahead.

(Discussion held off the record)

THE COURT: Mr. Anker, is there anything else we need to talk about today? I understand the one issue involving Mr. Karlan's point.

MR. ANKER: Yes. I was simply going to say to you, your Honor, I don't think it's an issue we need to discuss today, but we may be coming to you shortly with simply an application for your assistance to obtain an order from the local court so we can take Ms. Ann Rister's deposition. She is located -- we addressed this, your Honor, at page 5 of the letter at the bottom. Her prior counsel had -- in fact there was extensive e-mail throughout saying she would show up in New York. She apparently then retained different counsel from Mr. Ginsberg, and current's counsel's position is, we need to go to the Bahamas, I think, to do that -- although I'm not licensed in the Bahamas. We may need an order of a court there. I think the process is your Honor issues an order asking for aid, and we then bring that back down to the Bahamas and get it domesticated.

THE COURT: And when that happens, does that mean she's deposed there or here?

MR. ANKER: Deposed there, your Honor. This is a third party.

THE COURT: Why don't you just get an order to me now.

MR. ANKER: I think we will, your Honor.

THE COURT: Just send it to me.

MR. ANKER: We will do that, your Honor.

THE COURT: Is anyone else going to be deposed in the Bahamas, that we know of today?

MR. BLACKHURST: Not that we're aware of.

MR. KARLAN: Judge, the answer is, not that we know of today, but just so your Honor has all the back group, we've been trying to get a deposition of Walkers, the law firm from Cayman. They have declined to cooperate in that regard. We served a Southern District deposition subpoena on a partner of Walkers who was visiting our fair city. I don't know whether they intend to obey that subpoena or not. But that issue is floating around.

THE COURT: Off the record.

(Discussion held off the record)

THE COURT: I have a conference scheduled with you on August 1.

MR. ANKER: I believe that to be right.

THE COURT: Right. And that was when discovery closes. So we're going to keep that going the way it is.

The only issues I see now, other than we have to deal possibly with Mr. Karlan's problems, when he is deposed. It would be interesting, Mr. Karlan. What happens if I order you to turn the documents over? I guess you're going to have to call Judge Rakoff from the deposition and ask for a stay?

MR. KARLAN: And bring my toothbrush.

THE COURT: Hm?

MR. KARLAN: And bring my toothbrush, I guess.

THE COURT: No. I don't have contempt power. Judge

Rakoff does. But we'll lave that for you to deal with some day if you need to.

I used to tell people that, though. It was a common thing to say. Go to your deposition and when you come, depending on what happens, bring a toothbrush because I may keep you.

MR. KARLAN: Those of us who have been in matrimonial cases, Judge, never go to court without a toothbrush.

THE COURT: All right. So we have the Karlan issue to deal with, maybe. We're going to possibly deal with the issue of the deposition of Mr. Aaronson -- no, wrong person. Ms. Gummer, who's the person at your company who you want to avoid being deposed forever?

MS. GUMMER: Palermo.

THE COURT: Palermo.

MS. GUMMER: There are probably others. But he's already been served.

THE COURT: Palermo. We may have an issue, Mr. Karlan, with your clients.

Anyone else?

MR. BALBER: We have a small issue, Judge. Scott Balber again on behalf of Schulte. Plaintiffs owe us some documents that we've been pushing back and forth on. As recently as today, they told us they're going to produce them by the end of the month. That's not the issue, Judge. The

issue is that Mr. Krys's continuation of his deposition is supposed to be on Monday of next week. We obviously need the documents before we continue his deposition. We have asked for a third day once the documents are produced. I believe plaintiffs have suggested that his second day be adjourned till April. We're OK with that. I just don't want an issue to be not raised and therefore waived. So I want to make sure I'm aware of that issue.

THE COURT: Why don't we just carry the second day and get the documents produced. Is there a problem with that?

MR. BLACKHURST: Yes. And we proposed, for everyone in the room, we would propose April 10 or April 13 for Kenneth Krys's second day.

THE COURT: Put it off.

MR. BALBER: We're fine with that, Judge. I just didn't want it to be --

THE COURT: Just send an e-mail around to everybody, counsel.

MR. BLACKHURST: Yes.

THE COURT: Send an e-mail around to everyone with the dates. Or actually, you know, I'm going to let my scrivener put that in the stip of the order -- is that the second day of Mr. Krys's deposition?

MR. BALBER: That's correct, Judge.

THE COURT: Is what?

MR. BLACKHURST: We're proposing April 10 or April 13.

THE COURT: It will be either April 10 or April 13 subject to further discussions between counsel. OK?

All right. Any other issues?

MR. BALBER: Thanks, Judge.

MR. ANKER: Your Honor --

THE COURT: And I don't consider that an issue, by the way. I think it's just been resolved.

MR. ANKER: Two things. We got from Mr. Blackhurst yesterday as he indicated, actually today, a response about a series of documents that we requested at the Krys deposition. The letter -- we've gotten, actually, production today through a file. We haven't had a chance to look at it. I simply want to flag it again. We obviously need to look at those documents. I recognize your rules about raising or waiving, and so we obviously need to look at them before we can determine whether we're satisfied.

The only other issue I wanted to raise is the first in our letter. And that is the interrogatories. At this point, one of the things I want to try to do is narrow and get to the essence of what we care about. It seems to me that's helpful to everyone. At this point we're looking for one thing and one thing only, which is for plaintiffs to tell us in a written, sworn response, so it's binding, and so there's no surprises at trial with surprise witnesses, here are the witnesses we claim

who were PlusFunds' employees or Sphinx directors who read the Refco S1 S4.

To put this in context, your Honor, the entirety of the claim against my clients and other clients in this room, other entities in this room represented by other counsel, is the allegation that the plaintiffs read and relied on the securities offering materials which allegedly contained false statements, which allegedly we aided and abetted the falsity of it. So finding those witnesses who are going to testify, I read this, I relied on it, is important.

THE COURT: I don't have a problem with that, Mr. Anker.

MR. ANKER: That's all I'm asking. Just identify the witness so I can then depose him or her.

THE COURT: The question is, do they know everyone, and I assume the answer is yes. Can you identify --

MR. ANKER: Your Honor, they can certainly -- obviously, every interrogatory answer is answered to the best knowledge of the person who responds.

THE COURT: One could also take the position in that that's a contention interrogatory and they need to wait. But I don't think that's --

MR. ANKER: It's not. And Rule 33 of the local rules allows you to ask interrogatories to identify witnesses with knowledge. That's what we're asking. If later they determine,

if they tell me, it's persons one, two, and three, and two months from now, in good faith they discover it includes person four, they supplement their interrogatory response and then I take the deposition of person four.

THE COURT: Why don't we have the interrogatory answered by the end of the month. Any reason that can't be done?

MR. BLACKHURST: First of all, we think it goes beyond Local Rule 33.

THE COURT: What is Local Rule 33, sir?

MR. BLACKHURST: It says you can request the identity of witnesses, you can request the identity of documents. We have already identified all of the PlusFunds people that we contend were innocent, that worked at Sphinx and PlusFunds. They have noticed all these folks for deposition.

THE COURT: Hey guys, the only person who gets to interrupt anybody here is me. OK. So let's make that clear.

Now, does the Local Rule say that's truly all the time, or can it be varied by a judicial officer?

Sit down, Mr. Anker. Sit down, you're winning, Mr. Anker, so far.

MR. BLACKHURST: I can only assume that it can be altered by --

THE COURT: Me too. We're getting near the close of fact discovery. They need to know the people they're going to

be deposing. Those individuals are central to the case, aren't they? So I think that deserves an answer. Answer that interrogatory by the last business day of the month, with the understanding the rules allow that you can supplement if you identify more people.

MR. ANKER: Thank you, your Honor.

THE COURT: Better that than have discovery close and all of a sudden we find out there are other people out there and I have to deal with this in July. All right?

MR. BLACKHURST: Very well, your Honor.

THE COURT: If you need an extra week or two, I'm sure Mr. Anker will give you an extra week or two. Decide when you go out so when Mr. Anker sends a stip in as to what happened today, we have a date in there for certain, right?

MR. ANKER: That's fine, your Honor. I'm happy to do that.

THE COURT: OK. So we have the three R&Rs. We have got one dispositive motion. We don't know if there are going to be any other dispositive motions now. I've dealt with a couple other discovery issues today. I've put a few off. And with that, is everybody on track for their experts?

MR. BLACKHURST: Plaintiffs have disclosed their experts. We're working toward the expert discovery date.

THE COURT: After July 31.

MR. BLACKHURST: Correct. Or June 15th, I think, is

the initial opinion date.

MR. ANKER: Yes, Mr. Blackhurst is right. The current scheduling order provides for plaintiffs to disclose on June 15 and for defendants to disclose or provide their expert reports on July 31, so it's a staggered production.

THE COURT: All right.

Any other problems anyone anticipates now?

MR. KARLAN: Judge, plaintiffs and we have been having some conversations about some requests for admissions that we have served.

THE COURT: Requests for admissions are not discovery requests.

MR. KARLAN: I understand. We put it in a letter to you, Judge. But with your permission we would like, I would like to defer raising that with you in the hope that --

THE COURT: What's the issue? Just tell me again.

MR. KARLAN: The issue is whether, in responding to requests for admissions, the plaintiffs were required not simply to search the knowledge of the liquidator himself but to search the knowledge of the many, many agents and employees of Sphinx and PlusFunds with whom they are now in a contractual relationship. They have signed settlement agreements with a lot of people pursuant to which those people are supposed to cooperate with them in the prosecution of these cases. We're having a disagreement about what the rule requires them to do

on that issue.

THE COURT: How many people have they signed agreements with?

MR. BLACKHURST: I believe we have, give me one second to think.

THE COURT: I don't need an exact number.

MR. BLACKHURST: Five at the most. I'm thinking of three or four off the top of my head.

THE COURT: If there are only three, four, or five, I suggest you inquire of them. If there were 40 or 50 that would be a little different.

MR. KARLAN: To be clear, Judge, there are four -- I don't know what the number is. Whatever the number is that Mr. Blackhurst said there is are people with whom they have reached settlement agreements with cooperation. There is then an additional group of people who plaintiffs have --

THE COURT: Talking to.

MR. KARLAN: Threatening and having tolling agreements with, and by reason of the leverage of these tolling agreements, they have induced such witnesses to spend four and five hours with them at a time to educate them about the case. And apparently plaintiff's position is that during those five-hour prep sessions they were never required to go over an R&R phase with them. We're not sure it's right.

THE COURT: I'm not sure it's wrong. They're not

employees anymore. They don't have control over these -- well, in theory I suppose you could say you have control over them in the sense of threatening them with some bad outcome if they don't cooperate with you. If there is an agreement reduced to writing that requires cooperation, I don't have a problem with the plaintiff asking of those people what they need to ask -- respond to a letter, to a request. I have a problem with the idea that they're holding something over someone's head and talking to them. That somehow gives them control that they have to go to those people since they're not current employees.

You can have the discussions you want, but I think I've just about told you what's going to happen. All right?

MR. KARLAN: Thank you, your Honor.

THE COURT: All right. That dealt with motions. We're taking care of experts. We know we're going to see everybody in August. Anything anyone else anticipates happening?

OK. So off you all go to take depositions. Tell me when you go to Ireland or the Caymans or whatever. Maybe I'll have to go. So we'll see.

MR. BLACKHURST: There's one last issue. We raised in our letter, there is a question as to privilege on some documents that were produced to us. We just don't want to wait. And we're working, we've talked to them about it. We'll follow up with them.

THE COURT: When do you think we're going to get some resolution of all these questions?

Ms. Gummer is going to be making her motion, right, next week? Assuming you can't work something out.

MS. GUMMER: Yes, your Honor.

THE COURT: Which, again, I'll suggest should be worked out. And Mr. Karlan, I'm waiting to deal with you until your deposition begins. Right?

MR. KARLAN: Yes, sir.

THE COURT: Have whatever discussions you need to have about these privilege issues. But I want to get these things resolved sooner rather than later. So let's see what you come up with. OK?

MR. BLACKHURST: Yes.

THE COURT: All right. Barring some issues where I bring individuals in for arguments, which is in your case, Ms. Gummer, I'm scheduled to see you on Wednesday, August 1st at 4 p.m. Now, is that enough time? You're closing the discovery on the 31st. Your expert reports are going to be in. Is that going to be enough time to have whatever discussions you want to have about everything, to be in a stage where you can either make dispositive motions and we give you schedules or you get ready to try the case? Or you want the month of August to try to work everything out, considering it's August. It's up to you, folks. You're not under any deadlines from

Judge Rakoff.

MR. BALBER: Judge Rakoff's one deadline, your Honor, is the close of both fact and expert discovery by September 30. And I think the contemplation is that we will spend August and September on expert discovery. I do think, frankly, it would be better to see you in September.

THE COURT: I do too.

MR. ANKER: Perhaps toward the end, given vacations and other things in August.

THE COURT: I do too. How about September 12. Is that enough time? Or do you need a little more time, Mr. Anker?

MR. ANKER: I think a little more time would be helpful. The other thing, your Honor, I don't know when the Jewish holidays may be.

THE COURT: Rosh Hashanah, according to my calendar, is the 17th of September. So could we do a conference on the 18th? Because I've got to be at training judges the rest of that week. Is the 18th all right?

MR. DASH: Your Honor, there are some Jews who observe the second day of Rosh Hashanah. That may be a problem for some.

THE COURT: Fine. Let's do it the next day.

MR. ANKER: May perhaps the week after?

THE COURT: I'd love to, unless you're all going to

come to Chicago. Let's do it October 2. Is that all right for everybody? That's a Tuesday. What time shall we do it? Morning or afternoon? What's better? Morning or afternoon? October 2nd in the afternoon, 3 o'clock, to get you out by 5?

MR. ANKER: That sounds great, your Honor.

THE COURT: So let's put that in the stip of the order you're going to do, Mr. Anker. And what I want to talk about then is schedules for dispositives, number one, confirm that everything is done except expert deps. Right? They should be done by then.

MR. BLACKHURST: They should be done by then.

MR. ANKER: They should be done.

THE COURT: Number one, I want to confirm that all the discovery is done. Number two, schedule set for dispositive motions. What's your practice or preference with regard to pretrial orders? I don't know what Judge Rakoff's is really. Would he rather have motions done first and put in pretrial or pretrial orders done first? There's a big split everywhere about that. Does anyone know what his practice is?

MS. JOYCE: Your Honor, we have had trials before him before. He wants rulings and also summary judgment done prior to the trial date.

THE COURT: But that's different. No, the trial date is different than doing a pretrial.

MS. JOYCE: He has a standing order on pretrial

motions.

THE COURT: Which says what?

MS. JOYCE: The final pretrial order is due one week before the trial is scheduled to begin.

THE COURT: That solves our problem, because I can't give you trial dates until I get everything else done.

MR. BALBER: I'm sorry, Judge. I just remembered I have a trial starting in Milwaukee on October 1.

THE COURT: Wouldn't you rather be here?

MR. BALBER: I would much rather here, but unfortunately I will be otherwise engaged. If we could do a conference with your Honor the week before, that would be great.

MR. ANKER: Your Honor, my only -- Mr. Balber, I don't know how long your trial is. My only concern about the week before is, it's the last week before the close of expert discovery and this case is, like every other case, I suspect there will be a lot of depositions going on that week.

THE COURT: Let's leave it for 3 p.m. You know, I have no idea what's going to happen between now and October.

MR. ANKER: Your Honor, may I say one other thing on scheduling in that regard which may be consistent with Mr. Balber's request. I wonder whether, if we're talking about a schedule for dispositive motions, if it also makes sense for Professor Capra to be here since those motions will, as I

understand, Judge Rakoff's order here will be directed to him.

THE COURT: Oh, I agree.

MR. ANKER: I don't know what his schedule, obviously, is.

THE COURT: I'll e-mail Dan and see what he says. So let's keep an eye. If something else develops, you may have to have someone come in your place.

MR. BALBER: OK, Judge.

THE COURT: All right. So tentatively 3 p.m. on October 2. We're going to set up summary judgment motions and make sure all the discovery is done.

And I think it's fair to say that every defendant, no matter where they are in the pecking order, is going to be making a summary judgment motion. Is that about right?

MR. KARLAN: Yes.

THE COURT: So Judge Capra has something to do for the next two years, right?

MR. ANKER: I would imagine that's right, your Honor.

THE COURT: Any motions, any dispositive motions?

MR. BLACKHURST: We're considering some.

THE COURT: Well, think about it. If you're going to have them, they're going to get rolled into the schedule, so you'll just be making cross motions. You're going to move for summary judgment on liability?

MR. BLACKHURST: It will probably be discrete issues.

THE COURT: OK. That's fine.

Anyone contemplating now -- I know it's far ahead -- any kind of in limine motions anyone may be making? It's going to happen, guys.

MR. ANKER: If this case is like any others, I suspect the answer is there will be motions in limine. But I think the honest answer --

THE COURT: Too early.

MR. ANKER: It's way too early for anyone to know the answer to that.

THE COURT: OK. So, Mr. Anker, if you get me just a stip, I don't care what you call it, send me an order. Send me an order.

MR. ANKER: We will, your Honor.

THE COURT: Whenever you're ready. No rush. And I'll let Professor Capra know about the date on October 2. And I'm just going to drop him an e-mail and say as far as we know there are also three R&Rs pending. And when I hear back from him, if we need to move the date around, I'll tell you, and you can communicate it to everybody. All right?

MR. ANKER: Very well, your Honor. Thank you.

THE COURT: Anything else anyone need or want, other than to get out of the case?

How much money do you want, by the way, just out of curiosity, to settle this?

MR. BLACKHURST: We'll take a billion.

THE COURT: A billion.

MR. BLACKHURST: Sure.

THE COURT: All right. Well, you know, I know Judge Rakoff is probably going to want to appoint someone else as a mediator, and it's kind of a nonstarter even as a number, don't you think?

MR. BLACKHURST: It's a large number.

THE COURT: I'm sorry?

MR. BLACKHURST: It was a large number.

THE COURT: Well, I know, but that doesn't help us, whoever is going to mediate, when you start at 1 billion.

MR. BLACKHURST: I honestly have no idea what the client would consider for settlement.

THE COURT: I think you better give some thought to it, because if there are not discussions about it yet, when I see you in October, there's going to be some reference probably to some type of ADR. All right. I have to talk to Judge Rakoff about that, but we'll do that.

OK. Thank you, folks.

COUNSEL: Thank you, your Honor.

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